STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 21, 2005
v	No. 255727 Wayne Circuit Court
MARVEL DANIEL, Defendant-Appellant.	LC No. 03-013975-01

Before: Sawyer, P.J., and Markey and Murray, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of second-degree murder, MCL 750.317. Defendant was sentenced as an habitual offender-third to forty-five to seventy-five years' imprisonment. We affirm.

I. Material Facts

On August 14, 2003, Jonathan Howard went to Arnita Johnson's house in Detroit. Defendant later arrived at the house along with several individuals, including the victim, D'Andre Cooper. Arnita went across the street to the home of Janice Johnson, her sister, but shortly returned thereafter. According to Arnita and Janice, Howard sold drugs for defendant, and they bought or received heroin and cocaine from them.[1] On the evening of the incident, defendant and Howard had been drinking beer at Arnita's house.

Arnita specifically remembered Cooper because he was wearing a big, gold chain around his neck, and she had joked with him about it. While Arnita spoke with Cooper, defendant and Howard went to a bathroom located in the back of the house for approximately five minutes. After defendant and Howard exited the bathroom, defendant sat on the couch and Howard went upstairs. Cooper and the other three unidentified individuals then exited the house, and Howard came downstairs and also exited the house. At this point, defendant handed Arnita a packet of heroin, and told her not to say anything if she saw or heard anything. Defendant then exited the house. Arnita told her roommate, Kerry Baum, that defendant said to ignore whatever they heard or saw in the next "little bit."

[1] Defendant and Howard had both sold drugs at Arnita's and Janice's houses.

A few minutes later, Arnita went upstairs where she heard a gunshot. Arnita looked out her window and saw Howard wielding a big, silver gun and Cooper lying in a pool of blood. Howard saw Arnita looking, and he ran away. Arnita also saw defendant leave in his van the same time Howard left. Arnita did not call the police regarding the incident, and attempted to avoid police contact because she was afraid of defendant and Howard. The following day, Howard came to Arnita's home with the same gun he had the prior evening. When Arnita asked Howard why he shot Cooper, Howard explained that Cooper previously shot him and "blew his cousin's brain [sic] all over his face." Howard also brandished a cellular phone he said had belonged to Cooper. A few months following the incident, defendant came over to Arnita's home, wearing Cooper's gold chain. Howard had also informed Janice that he shot Cooper because he had shot him and his cousin. Howard explained to Janice that he told Cooper to turn around, and that he shot him in the back of the head when he did not turn around.

Following the shooting, Officer Chris Meredyk of the Detroit Police Department responded to a radio call, and found Cooper dead on the scene. Meredyk found several items around Cooper's body, including keys, chewing gum, and a condom. Officer Thomas Smith indicated that Cooper's pockets had been turned inside out and emptied, and that there were keys, miscellaneous papers, and a condom on the ground next to him. Cooper's death was determined by the medical examiner to have been caused by multiple gunshot wounds to the head.

The police performed an investigation at Janice's house, where they located the silver gun Howard used in the shooting. Investigator Donald Olsen of the Detroit Police Department attempted to speak with Arnita regarding the shooting. Arnita was reluctant to talk to Olsen, and said he was trying to get her killed because the person involved in the shooting (Howard) was standing nearby. The following day, Olsen arrested Howard, and found Cooper's cell phone in his possession. Defendant was subsequently found hiding in the attic of his mother's house, where he was arrested.

II. Jury Instructions/Aiding and Abetting

Defendant first argues that the trial court erred in instructing the jury on the lesser included offense of second-degree murder. We disagree.

This Court reviews de novo claims of instructional error. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002). "[A]n inferior-offense instruction is appropriate only if the lesser offense is necessarily included in the greater offense, meaning, all the elements of the lesser offense are included in the greater offense, and a rational view of the evidence would support such an instruction." *People v Mendoza*, 468 Mich 527, 533; 664 NW2d 685 (2003).

Defendant contends that the evidence presented at trial did not support the instruction for second-degree murder. Defendant indicates that Howard's intent was never in question, and that the only issue was whether defendant aided and abetted (participated) in the killing of Cooper.

The elements of second-degree murder require the following: (1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse. MCL 750.317; *People v Maynor*, 256 Mich App 238, 244; 662 NW2d 468 (2003), aff'd 470 Mich 289 (2004). In order to demonstrate malice, the prosecution must demonstrate that the defendant had the

intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm. *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). In addition, to demonstrate that a defendant aided and abetted a crime,

> the prosecution must show that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement. [*People v Izarraras-Placante*, 246 Mich App 490, 495-496; 633 NW2d 18 (2001) (citation omitted).]

We find that there was sufficient support for the trial court's instruction of second-degree murder under an aiding and abetting theory. Here, there was evidence that Howard caused the death of Cooper with malice and without justification. Defendant and Howard went to the back bathroom for approximately five minutes. Upon returning from the bathroom, the houseguests, including Cooper, left the residence. Howard briefly went upstairs, and then exited the house. Arnita heard gunshots after she went upstairs. Upon looking out her window, Arnita saw Howard holding a large, silver gun and Cooper lying in a pool of blood. Howard looked up and saw Arnita, and then left the scene of the incident on foot. Upon investigating the scene, police officers found that Cooper's pockets were emptied of their contents and that there were miscellaneous items located around Cooper's body. Additionally, Howard appeared at Arnita's home the following day along with his gun and Cooper's cellular phone, where he informed Arnita that he killed Cooper because Cooper previously shot him and his cousin. There was also evidence that Howard had instructed Cooper to turn around, but that Howard shot him in the back of the head when he did not follow the instruction. Accordingly, such evidence would support an instruction on second-degree murder.

Furthermore, there was ample evidence to demonstrate that defendant aided and abetted in the crime. Here, there was evidence that the crime charged was committed by defendant or some other person (Howard). The evidence also demonstrated that after defendant and Howard went to the bathroom together, Howard went upstairs and quickly exited the residence. At that point, defendant handed Arnita a packet of heroin and instructed her not to say anything about what she heard or saw immediately preceding the incident, thereby performing acts that assisted in the commission of the crime. Several months after the incident, defendant appeared at Arnita's home wearing Cooper's necklace, which she had previously joked with Cooper about. From this evidence, it could be inferred that defendant either had the intent to commit second-degree murder or that he had the knowledge that Howard intended the commission of the crime based on defendant's comments and subsequent possession of Cooper's necklace. Accordingly, the trial court did not err in instructing the jury on the lesser included offense of second-degree murder on the aiding and abetting theory.

Defendant also argues, in propria persona, that there was insufficient evidence to demonstrate that he aided and abetted in the crime committed. Again, we disagree.

This Court reviews de novo challenges to the sufficiency of the evidence. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). In reviewing a claim that there was

insufficient evidence, this Court must view "the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the crime were proved beyond a reasonable doubt." *People v Moorer*, 262 Mich App 64, 76-77; 683 NW2d 736 (2004). Further, this Court must "draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Here, defendant claims that the prosecution failed to demonstrate that he participated in the crime. However, as previously stated, there was sufficient evidence to demonstrate defendant's participation in the crime as an aider and abettor. The evidence presented demonstrates that defendant performed acts that assisted in the crime, and that defendant intended the commission of the crime or had knowledge that Howard intended its commission at the time he gave aid. Thus, there was sufficient evidence to support defendant's conviction.

III. Rereading of Testimony to the Jury

Defendant next argues that the trial court abused its discretion because it completely precluded the jury from making additional requests to rehear the trial testimony. We disagree. Defendant did not raise an objection to the trial court's ruling regarding the transcripts; therefore, we review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

The decision whether to allow the jury to rehear testimony is discretionary and rests with the trial court. *People v Carter*, 462 Mich 206, 218; 612 NW2d 144 (2000). Pursuant to MCR 6.414(H):

> If, after beginning deliberation, the jury requests a review of certain testimony or evidence, the court must exercise its discretion to ensure fairness and to refuse unreasonable requests, but it may not refuse a reasonable request. The court may order the jury to deliberate further without the requested review, so long as the possibility of having the testimony or evidence reviewed at a later time is not foreclosed.

Here, the jury requested a copy of "the transcripts." The trial court asked the jury foreperson what transcripts they wanted, to which the juror replied that they wanted "a copy of the witnesses' statement." The trial court replied as follows:

> Okay. They are not available today.
>
> * * *
>
> She has not had opportunity to transcribe them. They're still in the machine there. So, they're not available today. What you must do is to deliberate based on your best recollection of what the witnesses' testimony was, okay?
>
> All right. Return to jury room and there deliberate until you reach verdict in this case.

After the jury made a broad request, not for the transcript of a specific portion of the trial but rather for the "witnesses' statement," the trial court informed the jury that those transcripts were not available on that day. The trial court therefore did not foreclose the possibility of the jury ever receiving the transcripts, in that it merely indicated that the transcripts were not available on that particular day. Accordingly, the trial court did not abuse its discretion in denying the jury's request for transcripts, and defendant has failed to demonstrate plain error affecting his substantial rights.

IV. Offense Variable (OV) 14[2]

Finally, defendant argues, in propria persona, that the trial court erred in scoring OV 14 because there was no evidence demonstrating he was the leader in a multiple offender situation. We disagree.

Although defendant has failed to provide this Court with a copy of the PSIR as required by MCR 7.212(C)(7), the record reflects that defendant did argue that OV 14 should be scored at zero points, stating that there was a lack of evidentiary support under this variable. Defendant further argued that merely because Howard was selling drugs on behalf of defendant did not require a finding that defendant was a leader, where it was Howard who did the actual shooting.

"'A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score. Scoring decisions for which there is any evidence in support will be upheld.'" *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002) (citations omitted). Pursuant to MCL 777.44, the sentencing court must score ten points if "[t]he offender was a leader in a multiple offender situation," and zero points if "[t]he offender was not a leader in a multiple offender situation." The statute further instructs that "[t]he entire criminal transaction should be considered when scoring this variable." MCL 777.44(2)(a).

Considering the entire criminal transaction, we find that the trial court's score of OV 14 at ten points was adequately supported by the evidence. Here, there was testimony that Howard sold drugs for defendant. Prior to the shooting, defendant and Howard went to a bathroom together, and later returned, at which point Howard went upstairs, returned with a firearm, and exited the house. Defendant then instructed Arnita not to say anything about what she saw or heard before he also exited the house. Shortly thereafter, Arnita heard gunshots and saw Howard standing near Cooper's body armed with a silver gun. Cooper's pockets were found emptied of their contents, and Howard was later arrested with Cooper's cellular phone in his possession and defendant was seen wearing Cooper's gold necklace. Although there was conflicting evidence regarding Howard's motive for the killing, the above evidence clearly supports the sentencing court's determination that defendant was the leader in this multiple offender situation, as it could be inferred that Howard, who worked for defendant, shot Cooper upon defendant's instructions in order to commit a robbery.

[2] We note that defendant was sentenced before a different judge than the judge who presided over the trial.

Defendant also contends that his sentence violates *Blakely v Washington*, 542 US __; 124 S Ct 2531; 159 L Ed 2d 403 (2004). However, our Supreme Court has specifically held that *Blakely* does not affect this State's sentencing scheme. *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004). Accordingly, defendant's argument fails in this respect.

Affirmed.

/s/ David H. Sawyer
/s/ Jane E. Markey
/s/ Christopher M. Murray